IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 4, 2008 Session

PHOENIX INSURANCE COMPANY v. ESTATE OF MARY NAPIER GAINER, ET AL.

Appeal from the Circuit Court for Davidson County
No. 01C-1434 Barbara Haynes, Judge

No. M2007-01446-COA-R3-CV - Filed December 19, 2008

This is the second appeal in a case where a tenant's property insurer brought subrogation action against the Landlord and Rental Agent, who were also additional insureds on commercial general liability policy issued by insurer, to recover for fire loss paid on personal property insurance policy issued to Tenant. In an earlier proceeding, the trial court granted summary judgment in favor of Landlord and Rental Agent, holding that the Landlord and Rental Agent were additional insureds under the insurance policy issued to insurer's subrogor, Tenant, and, therefore, the antisubrogation rule applied. Insurer appealed and this Court reversed, holding that the antisubrogation rule did not apply unless coverage was provided to Landlord and Rental Agent as additional insureds under the CGL policy; the case was remanded to the trial court to determine whether the indemnity clause in the lease would prohibit Tenant from suing Landlord and Rental Agent for their alleged negligence and, if so, whether, based on these facts, a lawsuit filed by Tenant against Landlord and Rental Agent for the Tenant's personal property damage would trigger the comprehensive general liability portion of the insurance policy. On cross motions for summary judgment, the trial court again entered summary judgment in favor of Landlord and Rental Agent. Finding error, we reverse and remand this case for further proceedings in accordance with this opinion.

Tenn R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., J. and ANDY D. BENNETT, J., joined.

Donald Capparella, Nashville, Tennessee, Albert S. Nalibotsky, Charlotte, NC and David O. Huff, Nashville, Tennessee, for the appellant, Phoenix Insurance Company.

Brenda M. Dowdle, and Barbara J. Perutelli, Nashville, Tennessee, for the appellees, Estate of Mary Napier Gainer and Bryan, Ward & Elmore, Inc.

OPINION

Richards and Richards ("the Tenant") leased a storage facility from Mary Napier Ganier ("the Landlord").[1] The lease required the Tenant to obtain personal property insurance for its own benefit.[2] The lease also required the Tenant to obtain comprehensive general liability insurance for the benefit of the Tenant, the Landlord, and the Landlord's rental agent, Bryan, Ward & Elmore ("the Rental Agent"). The Tenant obtained property insurance and comprehensive general liability ("CGL") insurance through Phoenix Insurance Company ("Phoenix"). A metal shed located on property next to the leased premises caught fire, allegedly due to the negligence of the Landlord and the Rental Agent.[3] The fire resulted in substantial damage to the Tenant's personal property. Pursuant to the property insurance portion of the policy, Phoenix paid the Tenant $1.1 million for the damage to the Tenant's personal property. Phoenix then filed this subrogation action against the Landlord and Rental Agent.

The trial court initially granted summary judgment to the Landlord and Rental Agent after concluding they were additional insureds under the Tenant's CGL policy and, therefore, Phoenix could not pursue a subrogation action against its own insured. Phoenix appealed and this Court reversed the judgment of the trial court; in remanding the case for further proceedings this Court instructed the trial court to determine whether the indemnity clause in the lease would prohibit the Tenant from suing the Landlord and Rental Agent for their alleged negligence. This Court explained that if the indemnity provision did not prevent the Tenant from suing the Landlord and Rental Agent, then the trial court must determine whether a lawsuit filed by the Tenant against the Landlord and Rental Agent for the Tenant's personal property damage would trigger the CGL portion of the insurance policy. If the CGL policy required Phoenix to defend or indemnify the Landlord or Rental Agent in a claim brought by the Tenant for its property damage under the particular facts of this case, then Phoenix could not pursue a subrogation action against its insureds, the Landlord and Rental Agent.

On remand the parties filed cross motions for summary judgment on the issue of interpreting the indemnity provision of the lease and the CGL policy. The trial court granted summary judgment to the Landlord and Rental Agent finding that the indemnity provision in the lease prohibited the Tenant from filing a claim against the Landlord and Rental Agent for damage to the Tenant's property and that the CGL policy required Phoenix to indemnify and defend the Landlord and Rental Agent for damage to the Tenant's personal property when this damage occurred on the leased premises; consequently, Phoenix could not pursue a subrogation action against its insured.

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[1] The Landlord, Mary Napier Ganier, passed away during the pendency of these proceedings and her estate was substituted as a defendant. For ease of reference, we will refer to the estate as the "Landlord."

[2] The Landlord obtained property insurance for the leased building for its own benefit.

[3] The property on which the shed was located was also owned by Landlord.

On this appeal, Phoenix asks this Court to determine whether the indemnity clause in the Lease bars Phoenix's subrogation claims against both defendants and whether the subrogation claim of Phoenix triggers the duties to defend or indemnify contained in the CGL policy thereby barring the action under the antisubrogation rule.

Background

The Landlord owned a storage facility located in Nashville, Tennessee. The Landlord's Rental Agent leased a portion of the storage facility to the Tenant. On June 18, 1998, a fire started in a metal shed owned by the Landlord, which was located on property adjacent to the property leased by the Tenant. The fire spread to the property leased by the Tenant, causing substantial damage to the Tenant's personal property located there. The Tenant was insured through Phoenix, which eventually paid $1.1 million to the Tenant for damage to the Tenant's personal property.[4]

Phoenix then filed this subrogation lawsuit against the Landlord and Rental Agent. Phoenix claimed that several times between April 18 and June 18, 1998, the Tenant discovered that vagrants were gaining access to the metal shed located on the adjoining property for purposes of habitation. Phoenix further claimed that the Tenant notified the Landlord and Rental Agent of the situation. On June 18, 1998, the shed caught fire and the fire spread to the building leased by the Tenant. Phoenix claimed the fire was started by one of the vagrants. In the complaint, Phoenix alleged the Landlord had a duty to exercise reasonable care in maintaining the shed and keeping the property in a safe condition. Phoenix claimed the Landlord breached various duties by:

> a. Failing to properly maintain the vacant shed in a safe condition when [the Landlord] knew or should have known it constituted a fire hazard;
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> b. Failing to secure and/or repair the shed in a manner so that vagrants would not gain access as [the Landlord] knew or should have known it posed a fire hazard;
>
> c. Failing to take the necessary precautions to prevent a fire from occurring within the shed; and
>
> d. Otherwise failing to use due care under the circumstances.

[4] The $1.1 million paid by Phoenix to the Tenant under the terms of the Tenant's personal property insurance included amounts for the Tenant's property losses, but also the cost of stabilizing and restoring records and documents of the Tenant's clients, expenses the Tenant incurred in moving locations in order to protect the remaining records, and the cost of repairing shelving that had been loaned to the Tenant. Phoenix paid these sums to the Tenant after litigation in which the court found that such expenses were covered under the terms of the Tenant's property insurance policy with Phoenix. The Landlord and Rental Agent assert that these payments represent third party claims, however, since the previous litigation between Phoenix and the Tenant resulted in a ruling that these claims were in fact covered under the terms of the Tenant's property insurance policy we consider them first-party claims of the Tenant.

Phoenix brought essentially the same claims against the Rental Agent. Phoenix later amended its complaint to allege liability of the Landlord and the Rental Agent on the basis of various code violations.

First Summary Judgment and Appeal

Landlord and Rental Agent filed a motion for summary judgment asserting that they were additional insureds under the insurance policy issued by Phoenix, and, as a result, the subrogation claim by Phoenix should be dismissed because Phoenix is prohibited from pursuing a subrogation action against its own insureds. Phoenix responded to the motion, claiming its subrogation rights did not arise from the comprehensive general liability policy. Rather, Phoenix claimed its subrogation rights arose from a separate property policy issued to the Tenant for which the Landlord and Rental Agent were not additional insureds. Phoenix filed the affidavit of Kennie Parker, who was its underwriting manager when the policies at issue were written. According to Parker:

> 3. [The Tenant] purchased a package insurance policy, which consisted of multiple lines/types of coverage. The lines/types of coverage were property, comprehensive general liability, crime and inland marine.
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> 4. Each line of coverage under the package policy was considered divisible, which means that each line of coverage could be written individually under the same system and under the same policy symbol (which in this case was 600).
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> 5. Under the package policy, the agent, on behalf of [the Tenant], submitted separate applications (called ACORDS) for each line of coverage. For example, there was a separate application for property coverage and for liability coverage.
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> 6. Property insurance covers damage to property owned or the responsibility of [the Tenant], called "first party coverage," and pays the insured the proceeds of the policy for the damage to its own property.
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> 7. Comprehensive general liability (CGL) insurance coverage covers an insured's/additional insured's liability for damage to a third party's property or bodily injury to a third-party that arises out of the operation of the named insured, in this case [the Tenant].
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> 8. The principal distinction between liability and property insurance is that liability insurance covers one's liability to others, while property insurance covers damage to ones own property.
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> 9. As a result of the June 18, 1998 fire at the leased premises, [the Tenant] made a claim under its property policy coverage with Phoenix. The property policy covered

> damage to [the Tenant's] property and Travelers/Phoenix responded by paying the claim for that damage.
>
> 10. The landlord was not covered under [the Tenant's] property policy.
>
> 11. Since the fire originated outside the leased premises, and was unrelated to [the Tenant's] use and operation of the leased premises, the liability coverage was not triggered.

The trial court granted Landlord and Rental Agent's motion for summary judgment finding:

> The language of the lease between [the Tenant], and [the Landlord] evidences the parties intentions that the insurance was purchased for the mutual benefit of the Plaintiff's subrogor, [the Tenant] and the Defendants. Since the Defendants were additional insureds of the Plaintiff under the insurance policy issued to their subrogor, [the Tenant] pursuant to the law of Tennessee, *Miller v. Russell*, 674 S.W.2d 290 (Tenn. Ct. App. 1983), the anti-subrogation rule applies. Therefore the Plaintiff, as a matter of law, is not permitted to pursue subrogation against the Defendants, its own insureds.

In the first appeal, Phoenix raised two issues:

> 1. Whether the anti-subrogation doctrine applies when (1) the Lease expressly makes the Landlord an additional insured only under the comprehensive general liability coverage, but (2) that same Lease expressly requires the Tenant to obtain property insurance coverage on its own personal property solely for its own account?
>
> 2. Whether the indemnity clause in the Lease at issue only applies to actions of third parties, and does not exculpate the Landlord and Rental Agent from their own negligence?

This Court held:

> The Trial Court held that the "language of the lease between [the Tenant], and [Landlord] evidences the parties intentions that the insurance was purchased for the mutual benefit of the Plaintiff's subrogor, [the Tenant] and the Defendants." We agree with this conclusion only to the extent that the Trial Court was referring to the comprehensive general liability portion of the insurance policy. To the extent that the Trial Court was referring to the property insurance portion of the insurance policy, we conclude that the Trial Court was in error. *See Glens Falls Ins. Co. v. City of New York*, 293 A.D.2d 568, 741 N.Y.S.2d 68, 70 (N.Y. App. Div. 2002) (discussing virtually identical facts and holding that "[s]ince the tenant's [comprehensive general] liability insurance did not cover the loss, and the landlords

were not added to the tenant's property insurance as additional insureds, the tenant's policy does not cover the landlords with respect to the loss. Thus, the antisubrogation rule does not apply.") (citations omitted).

This Court instructed the trial court:

> On remand, if the Trial Court determines that the indemnity clause in the Lease would not prohibit the Tenant from suing the Landlord and Rental Agent for their alleged negligence, the Trial Court then must determine if, based on the facts of this case, a lawsuit filed by the Tenant against the Landlord and Rental Agent for the Tenant's personal property damage would trigger the comprehensive general liability portion of the insurance policy. As held by us, the Landlord and Rental Agent clearly are additional insureds under the comprehensive general liability coverage. In other words, the Trial Court must determine if, pursuant to the comprehensive general liability policy coverage, Phoenix would have a duty to defend or indemnify the Landlord or Rental Agent in a claim brought by the Tenant for its property damage under the particular facts of this case. If the answer to this question is yes, Phoenix cannot pursue a subrogation action against its insureds, the Landlord and Rental Agent.

Second Summary Judgment and Appeal

On remand, the parties submitted cross motions for summary judgment.[5] The trial court granted the Landlord and Rental Agent's motion in an order entered on May 30, 2007, finding:

> Plaintiff, Phoenix Insurance Company, is seeking reimbursement for damages paid to third parities as the Tenant's subrogee. Therefore, the indemnity provision against third party claims in this commercial lease bars Plaintiff's subrogation claim. Under the same rational, this Court finds that Plaintiff, Phoenix Insurance Company, is required to indemnify and defend the Defendants under the terms of the comprehensive general liability policy. This policy protects insureds and additional insureds from liability to third parties.[6]

The trial court entered an order amending its Findings of Fact and Conclusions of Law on July 19, 2007, in which the court further found:

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[5] Phoenix filed a partial motion for summary judgment on the issue of interpreting the terms of the lease and the comprehensive general liability insurance policy, but not on the issue of negligence.

[6] We note that the trial court was in error to the extent that it considered the payments Phoenix made to the Tenant under the Tenant's personal property insurance policy as "damages paid to third parties," since the court in previous litigation found the payments Phoenix made for damages resulting from the fire were covered under the express terms of the Tenant's insurance policy; consequently they are first-party claims of the Tenant that Phoenix now seeks reimbursement for in this subrogation action. *See* footnote 4 above.

> [T]he indemnity provision prohibits the tenant from filing a claim against the landlord or rental agent for damage to the tenant's property. The parties contracted, in a commercial setting, that recovery for property damage or demise would come from Tenant's own duty to obtain personal and comprehensive liability coverage. As the comprehensive general liability policy insured the tenant and insured the landlord and rental agent as additional insureds, Plaintiff, Phoenix Insurance Company, is required to indemnify and defend the Defendants for damage to the Tenant's personal property damage when this damage occurs on the leased premises. Plaintiff, Phoenix Insurance Company, cannot pursue a subrogation action against their insureds.
>
> This Court further finds that Plaintiff, Phoenix Insurance Company, is also seeking reimbursement for damages paid to third parties as the Tenant's subrogee. Therefore, the indemnity provision against third party claims in this commercial lease bars Plaintiff's subrogation claim. Under the same rational, this Court finds that Plaintiff, Phoenix Insurance Company, is required to indemnify and defend the Defendants under the terms of the comprehensive general liability policy. This policy protects insureds and additional insureds from liability to third parties.

The issues now before this Court on appeal are (1) whether the indemnity clause in the Lease bars Phoenix's subrogation action against both the Landlord and Rental Agent and (2) if the indemnity provision in the Lease does not bar this action, whether this action triggers the duties to defend and indemnify the Landlord and Rental Agent as additional insureds contained in the comprehensive general liability policy issued by Phoenix.

Analysis

I. Standard of Review

This appeal comes to us from the trial court's granting of the Landlord and Rental Agent's motion for summary judgment. This Court's review of a trial court's award of summary judgment is *de novo* with no presumption of correctness, the trial court's decision being purely a question of law. *BellSouth Adver. & Publ'g Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003). Summary judgment is appropriate when the moving party can show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993).

This case rests on the contractual interpretation of the leasing agreement and insurance contract. The legal effect of the terms of a lease as well as the insurance contract are governed by the general rules of contract construction. *Planters Gin Co. v. Federal Compress & Warehouse Co., Inc.*, 78 S.W.3d 885, 889 (Tenn. 2002); *McKimm v. Bell*, 790 S.W.2d 526, 527 (Tenn.1990); *Merrimack v. Batts*, 59 S.W.3d 142, 148 (Tenn. Ct. App. 2001). A court's initial task in construing a contract is to determine whether the language of the contract is ambiguous. *Id.* at 890. Summary judgment is appropriate in contract cases where the terms of the contract are not ambiguous making

the issue a pure question of law. *Id.* If the terms of the contract are ambiguous, then the court applies established rules of construction to determine the parties' intent. *Id.* "Only if ambiguity remains after the court applies the pertinent rules of construction does [the legal meaning of the contract] become a question of fact such that summary judgment is not proper." *Id.* The parties here do not challenge the appropriateness of summary judgment having agreed that there are no material facts in dispute regarding the issue of interpreting the lease and insurance contract. There are obviously disputed factual issues regarding the Landlord and Rental Agent's alleged negligence, but we are not called on to decide these issues here.

II. The Indemnity Provision in Lease Contract

In the first appeal, this Court identified the first issue for the trial court to decide on remand was "whether the Indemnity Provision contained in the lease prohibits Tenant from filing a claim against the Landlord or Rental Agent for damage to the Tenant's property. If the Tenant is so prohibited, Phoenix as subrogor is likewise prohibited." On remand, the trial court found that the indemnity provision in the Lease barred Phoenix's subrogation action because Phoenix was "seeking reimbursement for damages paid to third parties as the Tenant's subrogee."

Phoenix asks this Court now to determine whether the indemnity provision in the case at issue bars Phoenix's subrogation action against both the Landlord and Rental Agent where (1) the Rental Agent is neither mentioned in the indemnity provision nor a party to the Lease, (2) the language of the indemnity provision was not clear and unequivocal enough to exculpate the Landlord for her own negligence, and (3) the property damages that are the subject of the subrogation action were first party claims and not third party claims, making the indemnity provision inapplicable.

"In 'resolving disputes concerning contract interpretation, our task is to ascertain the intention of the parties based upon the usual, natural, and ordinary meaning of the contractual language.'" *Planters Gin Co.,* 78 S.W.3d at 889-890 (citing *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 95 (Tenn. 1999). This determination of the intention of the parties is generally treated as a question of law because the words of the contract are definite and undisputed, and in deciding the legal effect of the words, there is no genuine factual issue left for a jury to decide. *Planters Gin Co.,* 78 S.W.3d at 890; 5 Joseph M. Perillo, *Corbin on Contracts*, § 24.30 (rev. ed. 1998). The intent of the parties "is presumed to be that specifically expressed in the body of the contract" and "if clear and unambiguous, the literal meaning of the language controls the outcome of contract disputes." *Planters Gin,* 78 S.W.3d at 890. A contractual provision is ambiguous "only when it is of uncertain meaning and may fairly be understood in more ways than one." *Id.* (citing *Empress Health & Beauty Spa, Inc. v. Turner*, 503 S.W.2d 188, 190 (Tenn. 1973)).

The language at issue is found in paragraph 9 of the leasing agreement. This paragraph, captioned "Indemnity," states:

> Lessee shall indemnity [sic] lessor against all expenses, liabilities and claims of every kind, including reasonable counsel fees, by or on behalf of any person or entity

> arising out of either (1) a failure by Lessee to perform any of the terms or conditions of this lease, (2) any injury or damage happening on or about the demised premises, (3) failure to comply with any law of any governmental authority, or (4) any mechanic's lien or security interest filed against the demised premises or equipment, materials, or alterations of buildings or improvements thereon.

We do not find the language of this provision to be ambiguous. The language provides that the Tenant agrees to indemnify the Landlord for "all expenses, liabilities and claims of every kind ... arising out of ... injury or damage happening on or about the demised premises...." Contracts of indemnity are usually intended to provide against the loss or liability of one party through the operations of the other, or caused by physical conditions that are under the control of the indemnifying party, not the indemnified party. *See Kellogg Co. v. Sanitors, Inc.*, 496 S.W.2d 472, 474 (Tenn. 1973); 41 Am.Jur.2d *Indemnity* § 13. The majority rule among American jurisdictions is that indemnifying a party for its own negligence is extraordinary risk shifting and such agreements must be regarded as exceptional rather than usual in the majority of business transactions. *See e.g., Howey v. United States*, 481 F2d 1187 (9th Cir. 1973)("it is a long-established general rule that contracts will not be construed to indemnify a person against his own negligence unless such intention is expressed in clear and unequivocal terms"); *Batson-Cook Co. v. Industrial Steel Erectors*, 257 F2d 410 (5th Cir. 1958)(applying Alabama law); *General Acci. Fire & Life Assur. Corp. v. Finegan & Burgess, Inc.*, 351 F2d 168 (6th Cir. 1965)(applying Michigan law); *Joe Adams & Son v. McCann Constr. Co.*, 475 S.W.2d 721 (Tex. 1971). The U.S. Supreme Court noted its support for this widely accepted principal stating that "a contractual provision should not be construed to permit an indemnitee to recover for his own negligence unless the court is firmly convinced that such an interpretation reflects the intention of the parties." *U.S. v. M.O. Seckinger, Jr.*, 397 U.S. 203, 211 (1970).

Tennessee has long followed this majority principal. Under Tennessee law, contracts that indemnify a party against one's own negligence, while not against public policy, must state that intent in "expressly clear and in unequivocal terms." *See Kellogg*, 496 S.W.2d at 474; *Kroger Co. v. Giem*, 387 S.W.2d 620, 626 (Tenn. 1964)(held that unless the indemnity contract provides for indemnification for the indemnitee's own negligence by "clear and unequivocal terms," it will not be so construed and "general words will not be read as expressing such an intent"). "'Mere general, broad, and seemingly all inclusive language in the indemnifying agreement' is not sufficient to impose liability for the indemnitee's own negligence." *HMC Technologies Corp. v. Siebe, Inc.-Robertshaw Tenn. Div.*, No. E2000-01093-COA-R3-CV, 2000 WL 1738860 at *2 (Tenn. Ct. App. Nov. 27, 2000)(quoting *Kellogg*, 496 S.W.2d at 474). In *Wajtasiak v. Morgan County*, 633 S.W.2d 488 (Tenn. Ct. App. 1982), the court pointed out that such a rule is not unreasonable stating, "other courts have often noted, if negligent acts of the indemnitee are intended to be included in the coverage, it would only take a few seconds for the attorneys to use appropriate express language such as 'including indemnitees' acts of negligence.'" *Wajtasiak*, 633 S.W.2d at 490.

Applying these rules to the indemnity provision in this Lease, we cannot see any intent, express or implied, to indemnify the Landlord for its own neglience. The indemnification provision

here whereby the Tenant agrees to indemnify the Landlord against "all expenses, liabilities and claims of every kind" is "general, broad, and seemingly all inclusive." *See HMC Technologies Corp.,* 2000 WL 1738860 at *3 (provision that required Robertshaw to hold HMC harmless "to any claim of injury due to either the normal operation or the misuse of the proposed machinery" was too "general, broad, and seemingly all inclusive" such that it "did not express in clear and unequivocal terms an intent to require Robertshaw to indemnify HMC against HMC's own culpable conduct"); *First American Nat'l Bank v. Tennessee Gas Transmission Co.*, 428 S.W.2d 35, 39 (Tenn. 1967)(held that indemnitor's contract language, whereby it agreed to "assume the defense of ... all claims of any kind," was "too general to include damages from negligent acts of the indemnitee").[7]

Both parties contend that *Planters Gin Co. v. Federal Compress & Warehouse Co., Inc.*, 78 S.W.3d 885, 889 (Tenn. 2002), is the controlling case, though for different reasons. *Planters Gin* involved a warehouser of cotton that leased excess warehouse space to tenants. Planters Gin Company leased two warehouse compartments from Federal Compress that shared common walls and a common sprinkler system with an unleased third compartment. The lease required the tenant to insure the contents warehoused on the leased premises as well as obtain a waiver of subrogation clause in the insurance coverage as to the landlord, Federal Compress. Planters Gin maintained this insurance policy on its stored cotton and Federal Compress maintained an insurance policy on the building's physical structure. Under the terms of the lease, Federal Compress was required to maintain the water sprinkler system. One day during the lease term, heavy rainfall from a storm caused the roof to collapse over the adjoining non-leased compartment. The roof collapse caused a water pipe in the sprinkler system to break and water seeped through the wall and doors into the leased compartments damaging the tenant's stored cotton. Planters Gin, acting on behalf of its insurance carrier, filed a complaint grounded on negligence against Federal Compress.[8]

The Tennessee Supreme Court found that the indemnity provision in the lease prohibited Planters Gin from filing a lawsuit against Federal Compress for "any liability or loss . . . arising out of any cause associated with Lessee's business or use of the premises." *Planters Gin*, 78 S.W.3d at 891. Specifically, the court found "[n]othing in the contract limits this allocation of risk or suggests that this allocation of risk is contingent on the location of Federal Compress's alleged act of negligence." *Id.* The Court held open the possibility that "some negligent acts by a landlord could

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[7] Phoenix contends that the words "indemnify" and "hold harmless" have two separate meanings and the fact that the indemnification provision at issue does not use the words "hold harmless" is the reason the indemnification provision does not indemnify the Landlord against its own negligence. While there are some law review articles that argue "indemnify" and "hold harmless" represent distinct concepts, the terms are often used together or interchangeably. In fact, they are often considered the same concept because "Indemnify" comes from *indemnis* (harmless) and *facere* (to make). Black's Law Dictionary refers the reader of the definition of "Indemnify" to the definition of "Hold Harmless" and visa versa. This distinction is not relevant here as Tennessee courts have found indemnification provisions that use "hold harmless" may still be too "general, broad, and seemingly all inclusive" to construe them as indemnifying against indemnitee's own negligence. *See HMC Technologies Corp.,* 2000 WL 1738860 at *3.

[8] There was a second defendant, Wells Fargo Alarm Services, Inc., who was dismissed from the case after summary judgment where the court found that the contract between Federal Compress and Wells Fargo created no duty to Planters Gin on the part of Wells Fargo.

be so remote to the landlord/tenant relationship as to render the coverage of an otherwise applicable indemnity clause ambiguous, the failure of a commercial landlord to maintain the roof over the adjoining compartment in a cotton warehouse does not fall within such an exception." *Id.* at 892.

In the present case, the Landlord and Rental Agent contend that the fire that started from the Landlord and Rental Agent's alleged negligence in a shed that shared a common wall with the Tenant's leased unit is similarly not "so remote to the landlord/tenant relationship." Phoenix, however, contends that events in the present case actually are remote to the landlord/tenant relationship because the Landlord and Rental Agent's alleged negligence started on separate property that was not related to the leased premises. Phoenix points out that the facts here are similar to those in *Interested Underwriters v. Ducor's, Inc.,* 478 N.Y.S.2d 285 (N.Y. App. Div. 1984), which the *Planters Gin* court distinguished in its analysis. The *Planters Gin* court found the key fact distinguishing *Ducor's* from the *Planters Gin* case was that the two adjoining commercial buildings in *Ducor's* constituted two distinct premises with two distinct street addresses. The *Planters Gin* court noted that although there was an exculpatory provision waiving recovery against the landlord in *Ducor's*, that provision was inapplicable in that case because "the alleged negligence in the adjoining building was 'completely extraneous to any duty or obligation encompassed by the parties' agreement.'" *Planters Gin*, 78 S.W.3d at 892 (citing *Ducor's*, 478 N.Y.S.2d at 286-87). The *Planters Gin* court observed that the *Ducor's* court found the negligence to be "committed by a third-party who happens to be the landlord." *Id.* (citing *Ducor's*, 478 N.Y.S.2d at 286-87); *see also W.F. Zimmerman, Inc. v. Daggett & Ramsdell, Inc.*, 111 A.2d 448, 450 (N.J. Super. Ct. Law Div. 1955)("negligence in the operation of the [landlord's unrelated] commercial enterprise" was outside the limitation of liability anticipated by exculpatory clause).

We agree with Phoenix that the facts of this case distinguish it from *Planters Gin*. Significantly, the leased premises here is distinct from the adjoining property where the shed was located, even though they shared a common wall as in *Ducor's*. The Landlord and Rental Agent's operation and maintenance of the adjoining property was separate and unrelated to the leased premises and, therefore, outside the limitation of liability anticipated by the indemnification provision in the Lease. The indemnification provision here is also broader and more general than the one in *Planters Gin*, which indemnified the landlord for the negligent acts of the tenant. Because the language of the indemnification provision here does not clearly or unequivocally state that indemnification extended to the Landlord's own negligence or covered anything beyond the leased premises, we cannot construe the provision to shift such extraordinary risks to the Tenant/indemnitor. Rather, we construe it to carry the ordinary meaning of such a provision – that the Tenant indemnify the Landlord against claims of injuries or damages of third parties brought against the Landlord for losses happening on or about the leased premises due to the Tenant's use of the premises. Consequently, we reverse the trial court's finding that the indemnification provision in the lease bars this subrogation action by Phoenix.

III. Commercial General Liability Coverage

The above determination, however, does not resolve the case. Therefore, we next look to the CGL portion of the Tenant's insurance policy to determine whether Phoenix's duty to defend and indemnify the Landlord and Rental Agent as additional insureds is triggered by this subrogation action. If so, then the action is barred in accordance with this Court's opinion in the first appeal.

Issues regarding an insurer's duty to defend are matters of law and may be resolved by summary judgment when there are no genuine issues of material fact. *Standard Fire Ins. Co. v. Chester-O'Donley & Assocs., Inc.*, 972 S.W.2d 1, 6 (Tenn. Ct. App. 1998). Because there are no material facts in dispute here, the sole issue for our determination is whether the trial court erred as a matter of law when it concluded that Phoenix has a duty to defend and indemnify the Landlord and Rental Agent as additional insureds under the CGL policy. This Court reviews a trial court's interpretation of contract language *de novo* with no presumption of correctness. *Allstate Ins. Co. v. Watson*, 195 S.W.3d 609, 611 (Tenn. 2006).

Under Tennessee law, "whether a duty to defend arises depends solely on the allegations contained in the underlying complaint." *The Travelers Indem. Co. of America v. Moore & Assoc.*, 216 S.W.3d 302, 305 (Tenn. 2007); *St. Paul Fire & Marine Ins. Co. v. Torpoco*, 879 S.W.2d 831, 835 (Tenn. 1994) (quoting *Am. Policyholders' Ins. Co. v. Cumberland Cold Storage Co.*, 373 A.2d 247, 249 (Me. 1977)). Accordingly, the insurer has a duty to defend when the underlying complaint alleges damages that are within the risk covered by the insurance contract and for which there is a potential basis for recovery. *Travelers v. Moore*, 216 S.W.3d at 305. "The duty to defend is broader than the duty to indemnify because the duty to defend is based on the facts alleged, while the duty to indemnify is based upon the facts found by the trier of fact." *Id.* (citing *Torpoco*, 879 S.W.2d at 835). Any doubt as to whether the claimant has stated a cause of action within the coverage of the policy is resolved in favor of the insured. *Id.* (citing *Dempster Bros., Inc. v. U.S. Fid. & Guar. Co.*, 388 S.W.2d 153, 156 (Tenn. 1964)). Therefore, the central issue in this case is whether Phoenix's subrogation action on behalf of its insured, the Tenant, alleges damages that are within the risks covered by the CGL policy Phoenix issued to the Tenant and which the Landlord and Rental Agent are additional insureds.

CGL policies have been issued for more than half a century and are designed to protect an insured against certain losses arising out of business operations. *Travelers v. Moore*, 216 S.W.3d at 305*; see also Chester-O'Donley*, 972 S.W.2d at 6; *Am. Family Mut. Ins. Co. v. Am. Girl, Inc.*, 673 N.W.2d 65, 73 (Wis. 2004). Most CGL policies are written on standardized forms developed by the Insurance Services Offices, an association of domestic property and casualty insurers. *Travelers v. Moore*, 216 S.W.3d at 305*; see also* 690 PLI/Lit 591, 617-21 (2003); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 772 (1993). CGL policies are divided into several components, including the "insuring agreement," which "sets the outer limits of an insurer's contractual liability," the "exclusions," which "help define the shape and scope of coverage" by excluding certain forms of coverage, *Chester-O'Donley*, 972 S.W.2d at 7, and any "endorsements,"which modify the policy by changing the coverage afforded under the policy. 1 *Couch on Ins.* 3d § 1:3 (2008).

A court's interpretation of insurance contracts, such as the CGL policy in this case, is governed by the same rules of construction used to interpret other contracts. *McKimm v. Bell*, 790 S.W.2d 526, 527 (Tenn. 1990). An insurance contract "must be interpreted fairly and reasonably, giving the language its usual and ordinary meaning." *Naifeh v. Valley Forge Life Ins. Co.*, 204 S.W.3d 758, 768 (Tenn. 2006). In addition, "[i]nsurance policies should be construed as a whole in a reasonable and logical manner." *Travelers v. Moore*, 216 S.W.3d at 305 (citing *Chester-O'Donley*, 972 S.W.2d at 7). When the insurance contract in question is a CGL policy, "the 'insuring agreement' should be construed before the 'exclusions' to avoid confusion and error." *Id.*

The Tenant obtained a standard CGL policy from Phoenix, which named the Landlord and Rental Agent as additional insureds and supplied certificates of insurance to the Landlord and Rental Agent without objection.[9] The "insuring agreement" of the CGL policy in this case provides in relevant part:

> a. We will pay those sums that the *insured* becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages. However, we will have no duty to defend the *insured* against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply....
>
> b. This insurance applies to "bodily injury" and "property damage" only if:
> (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory...."

(Emphasis added).[10]

The CGL policy includes the following language: "[t]hroughout this policy the words 'you' and 'your' refer to the Named Insured shown in the Declarations [here, Tenant], and any other person or organization qualifying as a Named Insured under this policy." The policy further explains "[t]he word 'insured' means any person or organization qualifying as such under SECTION II - WHO IS AN INSURED." The construction of Section II, as applied to the facts of this case, is to extend coverage to the Tenant, a corporation, its executive officers and directors (with respect to their duties as officers and directors) and coverage for stockholders' liability.

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[9] As set forth in the affidavit of Kennie Parker, the CGL coverage was one of several types of coverage contained in the policy issued by Phoenix. Each type of coverage was divisible and Landlord and Agent were additional insureds on the CGL coverage only.

[10] An "occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The "coverage territory" is the United States. "Property damage" is defined as "[p]hysical injury to tangible property, including all resulting loss of use of that property."

Coverage for the Landlord and Rental Agent under the CGL policy is afforded through the endorsement adding them as "additional insureds." The endorsement provides in pertinent part:

> WHO IS AN INSURED (Section II) is amended to include as an *insured* the person or organization shown in the Schedule [Landlord and Rental Agent] but only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to *you*." (Emphasis added).

The two main cases the Landlord and Rental Agent point to in support of their argument that Phoenix has a duty to defend them under the CGL policy are *University of California Press v. G.A. Insurance Co. of New York*, 1995 WL 591307 (E.D.N.Y. Sept. 27, 1995), and *Travelers Indemnity Co. of Illinois v. Millard Refrigerated Services*, 2002 WL 442264 (D. Neb. Mar. 22, 2002).

In *University of California Press*, the plaintiff sued tenant's insurance company to recover a judgment originally obtained against the landlord for damages caused to plaintiff's personal property, which was stored in space leased to the tenant. The sprinkler system on the building's third floor, which was owned and under the control of the landlord, broke and water seeped into the first and second floors, which were leased to the tenant. The landlord was an additional insured under the tenant's general liability policy. Part of the defense was that the policy language (identical to that at issue in this case) naming the landlord as an additional insured did not provide coverage for the loss because the places which caused the damage were not part of the premises leased to tenant. In determining that the CGL policy covered the landlord as an additional insured for property damages, the court found that the "arising out of" language of the endorsement was ambiguous as applied to the facts of that case and construed the ambiguity against the insurance company. *Univ. of Cal. Press v. G.A. Ins. Co. of N.Y.*, 1995 WL 591307 at *5. Unlike *University of California Press*, we do not find the language at issue here, i.e. "liability arising out of the ownership, maintenance or use of that part of the premises leased to you," ambiguous. The sprinkler system in *University of California Press*, while technically outside "that part of the premises leased to you," was related to the ownership, maintenance or use of the leased premises, whereas here, the Landlord and Rental Agent's ownership, maintenance or use of the shed on the property adjacent to the leased premises was wholly unrelated to their ownership, maintenance or use of the leased premises.

In *Millard Refrigerated Services*, a fire occurred in a portion of the space leased by the tenant, but was not extinguished because the sprinkler system, which was specifically excluded from the tenant's lease, had been cut off by the landlord at the main water valve. In finding that the landlord was an additional insured under the CGL policy issued to the tenant, the court held "the liability in the underlying action 'arises out of' maintenance of the leased premises." *Travelers Indem. Co. of Ill. v. Millard Refrigerated Serv.*, 2002 WL 442264 at * 2 (D. Neb. Mar. 22, 2002). The court explained that "[t]he location of the sprinkler system valve or controls is of no consequence to the court's determination. It is undisputed that the sprinkler heads in the area of the fire were located in [the tenant's] leased space, and thus any deactivation of the sprinkler system is related to and causally connected to the maintenance of the premises leased to [the tenant]." *Id.* The fact that the sprinkler system that caused the damages in *Millard Refrigerated Services* was located

in the leased premises and, thus, "related to and causally connected to the maintenance of" the leased premises distinguishes that case from the present one where the Landlord and Rental Agent's ownership, maintenance or use of the shed was unrelated to their ownership, maintenance or use of the leased premises.

We agree with Phoenix that the facts in this case more closely resemble those in *Glenn Falls Insurance Company v. City of New York*, 741 N.Y.S.2d 68 (N.Y. App. Div. 2002), which involved an action by a tenant and its property insurance carrier against landlords to recover for losses sustained when a fire destroyed the leased premises. Tenant added landlords as additional insureds to its commercial liability coverage, which limited coverage to liability arising from tenant's operations or the premises rented to tenant. Similar to the facts of the present case, the fire in *Glenn Falls* did not start in the tenant's premises, nor was it the result of the tenant's operations. The *Glenn Falls* court determined that, since the fire did not start in the tenant's premsies or as a result of tenant's operations, the tenant's liability insurance did not cover the loss, Further, "[s]ince the tenant's liability insurance did not cover the loss, and the landlords were not added to the tenant's property insurance as additional insureds, the tenant's [property] policy does not cover the landlords with respect to the loss. Thus, the antisubrogation rule does not apply." *Id.*

The Landlord and Rental Agent here contend that the *Glenn Falls* case should be disregarded because it did not give "a well reasoned rationale" and it based its decision on New York authorities and the General Obligations Law § 5-321,[11] providing that indemnity agreements exempting lessors from liability for negligence are void and unenforceable, differing from Tennessee law. While the decision is brief at three pages in length, we find the court's rationale succinct, to the point and persuasive.

Since the additional insured endorsement here limits coverage to "liability arising out of the ownership, maintenance or use of that part of the premises leased to *you*" (i.e., the Tenant, Named Insured) and the damage did not "arise out of the ownership, maintenance or use" of the leased premises, but rather from the Landlord and Rental Agent's "ownership, maintenance or use" of unrelated property, the CGL policy does not provide coverage for the risk of damages alleged in the underlying complaint. Therefore, Phoenix does not have a duty to defend the Landlord and Rental Agent against the underlying complaint and the antisubrogation rule does not bar this action by Phoenix to recover damages it paid under the Tenant's property insurance policy.[12]

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[11] The court's mention of the New York General Obligations Law was in the context of dismissing the defendant's seventh affirmative defense – that the tenant breached its obligation to obtain insurance for the landlord – which was unrelated to the issue of whether the CGL policy covered the property damages asserted in the underlying subrogation action.

[12] Because this case can be decided based on the interpretation of the "Additional Insured" endorsement's modification of coverage afforded by the CGL policy, we need not analyze the policy's exclusions. *See Travelers v. Moore*, 216 S.W.3d at 306 ("[w]hen the insurance contract in question is a CGL policy, the 'insuring agreement' should be construed *before* the 'exclusions' to avoid confusion and error").

IV. Other Issues Raised By the Parties

The Landlord and Rental Agent contend that if the CGL policy does not afford them coverage for liability resulting from the underlying complaint, then the Tenant is in breach of the Lease, which required the Tenant to obtain a CGL policy "which insures against claims for bodily injury, death, or property damage, occurring on, in or about the leased premises *and on, in, or about the adjoining street, property and passageways*," (emphasis added). They argue further that since subsection (1) of the indemnification provision in the Lease indemnifies the Landlord for claims resulting from the Tenant's failure "to perform any of the terms or conditions of this lease," the present action by Phoenix, the Tenant's subrogee, is barred. We do not believe this argument is meritorious for the same reasons we have already held that the indemnification provision in the Lease is "too general, broad and seemingly all inclusive" to indemnify the Landlord for its own negligence and should be construed to carry the ordinary meaning of such provisions, which is that the Tenant indemnified the Landlord against third party claims resulting from the Tenant's breach of the Lease. Since the underlying action is based on first party claims of Phoenix's subrogor, the Tenant, and predicated on the alleged negligence of the Landlord and Rental Agent, the indemnity provision does not bar Phoenix's action.

The Landlord and Rental Agent contend, as an alternative theory, that "by delineating the parties' duty to obtain and bear the cost of insurance in the lease," the Tenant impliedly waived subrogation against the Landlord and Rental Agent. The Landlord and Rental Agent raise this issue for the first time on this appeal. It is a well settled principle of law that issues not raised in the trial court cannot be raised on appeal. *Simpson v. Frontier Cmty. Credit Union*, 810 S.W.2d 147, 152 (Tenn. 1991); *See Lovell v. Metro. Gov't of Nashville and Davidson County,* 696 S.W.2d 2 (Tenn. 1985); *Lawrence v. Stanford*, 655 S.W.2d 927 (Tenn. 1983). Moreover, waiver is an affirmative defense that must be pled or is waived as a matter of law. *Hollingsworth v. S.&W. Pallet Co.*, 74 S.W.3d 347, 353-54 (Tenn. 2002); Tenn. R. Civ. P. 8.03. The Landlord and Rental Agent never pled their claim of implied waiver of subrogation and, therefore, cannot present it to this Court for the first time on appeal.

Conclusion

When we examine the entire transaction – the lease agreement coupled with the Tenant's property insurance, the Landlord's property insurance[13] and the comprehensive general liability insurance for the mutual benefit of the Tenant, the Landlord and Rental Agent – it is clear that the parties intended the ordinary risk shifting involved in commercial leasing – that is, for the person best able to control a given risk to insure against that risk. For example, the Tenant was best able to minimize the risk of damage to its own property inside the leased unit while the Landlord was best able to minimize the risk of damage to its building, which included the leased unit. The use of the

[13] We considered the fact that the Landlord obtained her own casualty insurance, as required by the Lease, for the building that comprised the leased premises and was allegedly paid by her casualty insurance carrier for damages the building sustained as a result of the fire a tertiary factor that did not impact the disposition of the case.

indemnity provision and the CGL policy for the mutual benefit of all the parties was to protect against vicarious liability to third parties. The Landlord and Rental Agent now ask this Court to find that the parties intended to shift the extraordinary risks of the Landlord's own negligence or liability for damages not arising from the parties' ownership, maintenance or use of the leased premises to the Tenant, but we find no clear and unequivocal language in the lease or the CGL policy to support such an argument. The fire that caused the Tenant's property damages started on separate property that, while sharing a common wall and owned by the Landlord, was distinct and wholly unrelated to the ownership, maintenance or use of the leased premises. Since the indemnity provision does not "clearly and unequivocally" indemnify the Landlord for her own negligence and the property damages did not "arise out of the ownership, maintenance or use" of the leased premises such that the CGL policy would apply, Phoenix has no duty to defend the Landlord and Rental Agent against the underlying complaint; consequently Phoenix may proceed with this subrogation action. We, therefore, reverse the action of the trial court and remand the case to determine the issue of negligence.

Costs are assessed to the Estate of Mary Napier Gainer and Bryan, Ward, & Elmore, Inc., for which execution may issue if necessary.

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RICHARD H. DINKINS, JUDGE